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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

We accept the Board's Statement of the Case. We emphasize the following finding:

> "We note that refusal of the Respondent to let Hudik's employees install the climate control units was based on a valid work preservation clause in the agreement with Hudik, the subcontractor, and

was for the purpose of preserving work they had traditionally performed." (Pet. 141(a)) [1]

The record shows without contradiction that members of this union, working for this employer, Hudik-Ross, (hereafter referred to as "Hudik,") did perform the internal piping on air-conditioning units similar to those involved in this case manufactured by other companies, A. 46-47. That is the work that these employees were attempting to preserve.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case Hudik and the union entered into a collective bargaining agreement which conditions the employees' obligation to perform specified work on the assurance that they would "cut and thread internal piping in climate control units" which Hudik contracted to install. As the Board expressly found, this was a "valid work preservation clause * * * and was for the purpose of preserving work [Hudik's employees] had traditionally performed" (Pet. 141a). Thereafter, and notwithstanding its collective bargaining agreement, Hudik bid for, and was awarded, a subcontract let by Austin, a general contractor and engineer. That subcontract contained a specification that the internal piping in the climate control units to be installed was to be cut and threaded by the manufacturer's employees and not by the subcontractor's employees. Hudik's employees refused to install those units.

[1] "Pet." refers to the Petition for Certiorari; all references to the opinions in the court below and to the Board's decision will be to their reproduction in the Petition. "Bd.Br." will refer to the Board's brief. "A." will refer to the record appendix in this Court.

In conformity with this Court's holding in *Woodwork Mfrs.* v. *NLRB,* 386 U.S. 612 (*National Woodwork*), the Board acknowledges that the strike would have been lawful but for Hudik's contract with Austin. According to the Board, by that contract Hudik gave away to Austin "the right to control" [2] the decision as to who would thread the pipe. The circumstance of this second agreement, says the Board, transmuted Hudik from an involved primary disputant to a secondary who has no concern in the primary dispute and made the strike by Hudik's employees against their employer (Hudik) to require him to abide by his commitment contained in the first agreement an illegal secondary boycott under § 8(b)(4)(B).

The Board's recognition that the collective agreement between the union and Hudik is lawful is the inescapable result of the total identity between the clause in question here and the clause challenged in *National Woodwork* where

> "Frouge Corporation, a Bridgeport, Connecticut, concern, was the general contractor on a housing project in Philadelphia [and] had a collective bargaining agreement with the Carpenters' International Union * * * [which provided that] 'No [employee] will handle . . . any doors . . . which have been fitted prior to being furnished on the job . . .'. * * * These [fitting tasks are] traditionally performed in the Philadelphia area by the carpenters employed on the jobsite. However, precut and prefitted doors ready to hang may be purchased from door manufacturers. Although Frouge's contract and job specifications did not

[2] Throughout its history, the Board's doctrine at issue here has been described as either "right of control" or "right to control"; we shall use these terms interchangeably throughout this brief.

call for premachined doors, and 'blank' or 'blind' doors could have been ordered, Frouge contracted for the purchase of premachined doors from a Pennsylvania door manufacturer which is a member of the National Woodwork Manufacturers Association, petitioner in No. 110 and respondent in No. 111. The Union ordered its carpenter members not to hang the doors when they arrived at the jobsite." (386 U.S. at 615-616.)

National Woodwork responded by filing charges alleging that the "will not handle" provision violated § 8(e), and that the strike to require adherence to the agreement violated § 8(b)(4)(B). After a meticulous review of the evolution of the law prior to 1947, and of the Taft-Hartley and Landrum-Griffin legislative materials, the Court concluded that since the "objective of the ['will not handle' provision] was preservation of work traditionally performed by the jobsite carpenters * * * the Union's making of the * * * agreement was not a violation of § 8(e)", and that since "the conduct of the Union on the Frouge jobsite related solely to preservation of the traditional tasks of the jobsite carpenters [,] * * * the Union's maintenance of the provision was not a violation of § 8(b)(4)(B)" (386 U.S. at 646).

The Court emphasized that the "inquiry" required by a § 8(b)(4)(B) or § 8(e) charge is "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the] employees [of the employer who signed the agreement and who is being struck] or whether the agreements and boycott were tactically calculated to satisfy Union objectives elsewhere" (*id.* at 644). "The touchstone," said the Court, "is whether the agreement or its maintenance

is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" (*id.* at 645).

The issue here is therefore whether under the test enunciated by the Court it is a material difference that in *National Woodwork* Frouge violated its commitment in the collective agreement by opting to buy pre-cut doors, and that in the instant case Hudik violated its commitment first by opting to enter into a second agreement specifying that it was to install units with pre-cut and threaded pipe, and then by directing the employees to install such units.

It is our position that a strike by employees against their own employer to protest his failure to maintain their agreed-upon working conditions is the paradigm example of the primary activity which Congress protected by §§ 7 and 13 and differentiated from the secondary boycott prohibited by § 8(b)(4)(B). That permitted primary activity is not, we submit, converted into forbidden secondary activity because the employer's breach is accomplished not in one step (as in *National Woodwork*), but in two—the additional step being the employer's anticipatory breach by bidding for and accepting the subcontracts wherein he surrendered his "right to control" the decision of what work his employees are to perform. In both instances the "maintenance" of the collective agreement "is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees" (386 U.S. at 645), and is therefore primary activity.

Our difference with the Board therefore comes down to this. The agency believes that the test that determines an employer's status as a primary disputant against whom economic pressure may be brought is

whether the employer has retained the legal right to meet the employees' demand without effecting a change in his business relations with others. It is our view that the statutory test is whether the labor dispute concerns the struck employer's "labor relations * * * *vis-a-vis* his own employees." We submit that the fact that the employees' demands have the inevitable consequence of affecting the terms on which their employer deals with others has never been regarded as a basis for transmuting an obviously involved employer into a disinterested secondary.

In Part I we show that at all times Congress and this Court have regarded a dispute between employees and an employer relating to those employees' working conditions to be lawful primary activity which was not interdicted by the prohibition against the secondary boycott; (2) that the Act contemplates the use of economic weapons by the employees and by the employer in fixing the terms of their relationship, and does not protect either party against its own economic weakness; and (3) that a primary strike does not become a secondary boycott even if it has inevitable adverse effects on third parties who do business with the struck employer. The universal understanding of the line of demarcation is that stated by Sen. Taft:

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. *If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike.*" (93 Cong. Rec. 4323, emphasis added.)

In Part II we analyze the Board's doctrine in terms of its own rationale. We show first that after *National Woodwork* five Courts of Appeals determined that the

right of control test focuses on factors extraneous to the considerations which this Court there held (386 U.S. at 644-646) must govern in determining whether the maintenance of a work preservation agreement is primary or secondary. We next examine the reasoning by which the Board concludes that a strike to enforce a work preservation agreement *must* be directed at the party which has control, because (in the Board's view) the strike cannot be successful without a change of decision by that party. We show that the assumptions underlying that analysis completely ignore industrial reality, particularly the reality regarding the reasons unions go on strike. We point out that the employees' refusal to perform labor under conditions contrary to those agreed upon, is the most elementary form of primary concerted activity. We emphasize that a strike is rarely undertaken because short-run advantages are anticipated; rather, it is the long-run relationship between the employer and the employees which is at stake. Plainly, if the union acquiesces in the breach of its agreements, these become a mere scrap of paper. Lastly, in Part II we show that the Board's doctrine contains a fatal internal contradiction because it provides no acceptable answer to the following question: "If the union is not permitted to strike the contractor who has given up control, may it put pressure on the general contractor who does have control?" If the answer is "Yes", the focus of dispute is shifted from the bargaining unit covering the employer and his employees to some other party, thereby turning § 8(b)(4)(B) against itself. On the other hand, if the employees may not strike the party with control either, they are stripped absolutely of their right to protect their job security; this is a result

which the *National Woodwork* Court refused to attribute to Congress. The Board's vacillations and indecisions on this problem since it first adopted "right of control" only underscore the impossibility of reconciling its theory with the Congressional judgments embodied in the Act.

In Part III we discuss the only piece of legislative history cited by the Board, and the precedents in this Court on which it places reliance.

The Board cites a fragment of a sentence in the House Report on the Hartley bill, whose prohibitions were harsher than those which were ultimately adopted. Read in its entirety, the paragraph from which the Board quotes selectively establishes that even that bill was based on the understanding that the secondary strike is one that goes beyond economic pressure on the employer whose labor relations are the subject of the dispute.

The Board's reliance on the *Denver Building* case, 341 U.S. 675, is, as the court below explained at length (Pet. 36a-40a), misplaced. There is, indeed, an important parallel between this case and *Denver*. In both cases the underlying labor dispute was between the union and the subcontractor. But in *Denver* the union violated the Act by putting pressure on the general contractor who was not a party to the labor dispute, whereas in this case the union put pressure on the subcontractor, who was a party, because he was the employer. The Board asserts that in *Denver* the general was characterized as an "unoffending employer" because he lacked the right of control over the labor relations which were at issue in the dispute. But that is not what this Court said, and in fact the secondary party, the general contractor, did have control over the labor relations of the primary employer, the subcontractor, because he could terminate the subcontract. That is the precise "control" which the general contractor had in this case.

Lastly, the Board cites *Carpenters Union* v. *Labor Board,* 357 U.S. 93 (*Sand Door*), for the proposition that parties cannot by agreement convert secondary conduct into primary conduct. We agree. But here, the agreement was primary, a proposition established not only by *National Woodwork,* but by the Board's own determination (Pet. 141a). Since, as this Court held in *National Woodwork,* §§ 8(e) and 8(b)(4)(B) are coextensive in their definition of primary and secondary activity, the maintenance of that agreement by refusing to perform work under conditions which do not comply therewith, is also primary. (386 U.S. at 644-646.) Thus, the holding of *Sand Door* is inapposite. The proposition which is relevant in this case is that employers cannot by agreement "by design or otherwise" convert *primary* activity into *secondary* activity. *Steelworkers* v. *Labor Board,* 376 U.S. 492, 501 (*Carrier*).

ARGUMENT

I. THE RIGHT OF CONTROL THEORY IS INCONSISTENT WITH THE BASIC PRINCIPLES OF THE ACT.

A. The essence of our case is that a strike by employees against their own employer in defense of their own working conditions is protected primary activity, not a prohibited secondary boycott. Following the path mapped out by this Court in *National Woodwork,* 386 U.S. at 620-626, we begin our proof of that proposition by tracing the evolution of Congressional policy with respect to secondary boycotts.

The starting point is the holding in *Duplex Co.* v. *Deering,* 254 U.S. 443, that § 20 of the Clayton Act "im-

munized only trade union activities *directed against an employer by his own employees*"—a "primary boycott" (*National Woodwork*, 386 U.S. at 621) (emphasis added)—but not a secondary boycott, the "core concept" of which is "union pressure directed at a neutral employer the object of which was to induce or coerce him to cease doing business with an employer with whom the union was engaged in a labor dispute" (*id.* at 621-622).

The next step was the adoption of the Norris-LaGuardia Act which—particularly by its expansive definition of the term "labor dispute"—" 'established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation' " (*id.* at 622-623, quoting *United States* v. *Hutcheson*, 312 U.S. 219, 231). Thus,

> "Congress abolished, for the purposes of labor immunity, the distinction between primary activity between the 'immediate disputants' and secondary activity in which the employer disputants and the members of the union do not stand 'in the proximate relation of employer and employee . . . .' H.R.Rep.No. 669, 72d Cong., 1st Sess., 8 (1932)." (386 U.S. at 623)

The pendulum swung back with the enactment of what is now §8(b)(4)(B)[3] of the Taft-Hartley Act, the purpose of which was described by Senator Taft:

> "This provision makes it unlawful to resort to a *secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees.* . . . [U]nder the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. *All this provision of the bill does is to reverse the effect of the law as to secondary boycotts.*" (386 U.S. at 624, quoting 93 Cong. Rec. 4198.)

[3] This provision was § 8(b)(4)(A) under the 1947 amendments, and was redenominated § 8(b)(4)(B) in the 1959 Landrum-Griffin amendments. We shall throughout use the latter form to avoid confusion.

Thus, "[i]n effect Congress, in enacting §8(b)(4)[(B)] of the Act, returned to the regime of *Duplex Printing Press Co.*, and *Bedford Cut Stone Co.* [v. *Stone Cutters Assn.*, 274 U.S. 37] * * * " (386 U.S. at 632). From the beginning, that regime, as we have just seen, regarded strikes by employees against their own employer over their own working conditions—a primary boycott—as the polar opposite of the secondary boycott. This dichotomy was given pithy expression in Sen. Taft's explanation of §8(b)(4)(B):

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. *If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike.*" (93 Cong. Rec. 4323, emphasis added.)

B. It is not a mere happenstance that the 1947 Congress utilized the line of demarcation drawn in *Duplex* between primary activity—protected under the Act by §§ 7 and 13—and the secondary boycott—prohibited by §8(b)(4)(B). For the right of employees to strike their own employer in defense of their own working conditions—and the employer's correlative

right to employ economic pressure to gain his position—is the centerpiece of the national labor policy.

The thrust of the entire Act—especially through §§ 8(a)(5), 8(d), and 9, which require an employer to bargain collectively with the representative selected by an appropriate bargaining unit of his employees and to treat with that representative on the mandatory bargaining subjects stated in the Act—is to make the bargaining unit covering an employer and his employees the cockpit for resolution of disputes concerning employees' wages, hours, and other terms and conditions of employment. Cf. *Mine Workers* v. *Pennington,* 381 U.S. 657, 666; *Connell Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616, 625-626. As this Court held in sustaining the constitutionality of the Wagner Act:

> "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." (*Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45.)

Section 8(d), which, like § 8(b)(4)(B) was added to the Act in 1947, "made this policy an express statutory mandate" (*NLRB* v. *Burns Security Services,* 406 U.S. 272, 282-283).

In *Burns*, as on earlier occasions, it was necessary for this Court to remind the Board of "the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract" (406 U.S. at 287,

quoting *Porter Co.* v. *NLRB,* 397 U.S. 99, 108). See also *Labor Board* v. *American Ins. Co.,* 343 U.S. 395, 401-402; *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 490, 498; *Teamsters Local* v. *Labor Board,* 365 U.S. 667, 676-677.[4] And, this Court has also had repeated occasion to remind the Board that the indispensable condition of freedom of contract is the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties," and that economic warfare is therefore "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized" (*Insurance Agents,* 361 U.S. 477, 489.) See also *id.* at 490, 495, 497-498. The Act creates a system of "[c]ollective bargaining with the right to strike at its core * * * " (*Bus Employees* v. *Missouri,* 374 U.S. 74, 82). Accordingly, as was recently reiterated in *Ma-*

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[4] The Board does not avowedly disagree with this principle; but then, neither did it do so in the cited cases. Rather, in each, the Board discovered in some provision of the Act the purported authority to regulate employer or union conduct in a manner which did, as this Court then held, undermine that policy. See *American Ins. Co., supra* (§ 8(a)(5)); *Insurance Agents, supra* (§ 8(b)(3)); *Teamsters Local, supra* (§ 8(a)(3), § 8(b)(2)); *Porter Co., supra* (§ 10(c)); *Burns, supra* (§ 8(a)(5)). So it is with the Board's construction of § 8(b)(4)(B) here.

To be sure, § 8(b)(4)(B), unlike § 8(b)(3), is "drafted with reference to specific forms of economic pressure," *Insurance Agents, supra,* 361 U.S. at 498. But it was drafted with a clear understanding of the basic criteria for differentiating between conduct prohibited by that section and conduct which it does not reach. Thus, although the application of those criteria is often difficult, for example, in the common situs picketing situation to which Bd. Br. 14 tries to assimilate this case, it is not open to the Board to redefine these criteria and to treat as dispositive the answer to a "question" that has not "been asked" by Congress (id. at 499): "Who has the right to control?"

chinists v. *Wisconsin Emp. Rel. Comm'n.*, — U.S. —, 44 U.S.L.W. 5026 (June 25, 1976), this Court's decisions

> "* * * hold that Congress meant that [self-help] activities, whether of employer or employees, were not to be regulable * * * by the NLRB, [which is not] 'afforded flexibility in picking and choosing which economic devices of labor and management would be branded as unlawful' * * * [and is] without authority to attempt to 'introduce some standard of properly "balanced" bargaining power,' * * * or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.' [Such] regulation * * * den[ies] one party to an economic contest a weapon that Congress meant him to have available' * * * [and therefore constitutes] entry into the collective bargaining process to an extent Congress has not countenanced." (*Id.* at 5031.)

In sum, insofar as the dispute is between an employer and his employees and concerns the employees' own working conditions the Act sanctions the use of economic force and precludes Board interference in the contest of strength. A fundamental Congressional value judgment concerning the limited role of government in regulating the economy underlies the legislative determination that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act [, but rather,] is part and parcel of the process of collective bargaining" (*Insurance Agents*, 361 U.S. at 495). The basic philosophy of the Taft-Hartley bill was explained by Sen. Taft:

> "Basically, I believe that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. In the past few disputes finally reached the point where there was a direct threat to and defiance of the rights of the people of the United States.
>
> "We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. But if we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.
>
> "I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, 'You must work at wages fixed by the Government'? I think it is a long step from freedom and a long step from a free economy to give the Government such a right.
>
> "It is suggested that we might do so in the case of public utilities; * * *. It may be a popular

thing to do. Today people seem to think that all that is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.

"If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."[5]

C. This Court has effectuated the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own" (*Labor Board* v. *Denver Bldg. Council (Denver)*, 341 U.S. 675, 692) by recognizing that § 8(b)(4)(B) does not

> "ban traditional primary strikes and picketing having an impact on neutral employers even though the activity [falls] within its sweeping terms. *Labor Board* v. *International Rice Milling Co.*, 341 U.S. 665; see *Local 761, Electrical Workers* v. *Labor Board*, 366 U.S. 667. Thus, however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective." (*National Woodwork*, 386 U.S. at 626-627.)

The rule is that since "[s]ome disruption of business relationships is the necessary consequence of the

[5] 93 Cong. Rec. 3835-3836, quoted as authoritative, in full, in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 395, n. 21, and, in part, in *Bus Employees* v. *Missouri, supra*, 374 U.S. at 82, n. 9.

purest form of primary activity [t]hese foreseeable disruptions are * * * clearly protected. *Steelworkers* [v. Labor Board] (Carrier), 376 U.S. [492] at 496, *Electrical Workers* [v. Labor Board] (General Electric), 366 U.S. [667] at 682" (*NLRB* v. *Operating Engineers*, 400 U.S. 297, 304). See also *id.* at 303.

Thus, the *Denver* reference to an "offending employer" is to an employer with whom the union has a dispute over the working conditions of his employees, and against whom the union can lawfully bring economic pressure; and "unoffending employers and others" refers to those persons with whom the union does not have such a dispute, and against whom the Union may not bring economic pressure to cause the "unoffending employer" to cease doing business with the "offending employer." The distinction has nothing to do with the employer's competitive situation in the industry or his ability to comply with union demands covering the working conditions of his own employees. (The other side of the coin is that a party whose own employment practices are not involved in the dispute is deemed a "neutral" or "unoffending" employer, even though he has a substantial economic stake in the dispute, or even created the situation which makes it impossible for the union's demand to be satisfied by the employer.) The building trades' objection to the *Denver* case is precisely that it is economically unrealistic to treat the general contractor as a neutral given his large economic stake in the work costs of his subcontractor, and that his bidding practices favor the low-wage sub-contractor, thereby undermining union conditions. It is no more permissible for the Board and courts to substitute their views of economic "realism" (Pet. 111a-112a,

n. 66) for those of Congress where the subcontractor has given up "control" under the compulsion of the general's bidding specifications, than to do so in the *Denver* situation, where it is the employees' ox which is gored.

The indispensible condition for preservation of the right "to bring pressure to bear on offending employers" (*Denver,* 341 U.S. at 692) is that this right does not become a wrong because of the consequent "foreseeable disruption" of business relationships (*Operating Engineers,* 400 U.S. at 304). As the Court held in *National Woodwork,* "maintenance of [a] provision * * * [whose objective is] preservation of work traditionally performed by the [striking employees]" through a strike against those employees' employer is, on its face, primary activity (386 U.S. at 646). Thus, the fact that a necessary consequence of a successful work preservation strike is a disruption of business relationships between the struck employer (here Hudik) and another employer (here Austin) does not provide a basis for a finding that § 8(b)(4)(B) has been violated. Yet, as will appear herein, in the final analysis the Board's "right of control" doctrine rests on nothing more than the assumption (itself gravely flawed) that the only options open to Hudik which would satisfy his striking employees would require a disruption of Hudik's business relations with Austin.

II. THE RIGHT OF CONTROL THEORY IS UNTENABLE EVEN ON ITS OWN TERMS.

A. The Board observes that it has consistently adhered to the "right of control" theory since it decided *Clifton Deangulo and Local Union No. 98, Sheet Metal Workers (York Co.),* 121 NLRB 676, 685-686 (Bd. Br. 20, n. 13). So, indeed, it has, with the exception, critical both in practice and in its theoretical implications, that the Board has vacillated on whether economic pressure may be put on the party that *does* have control, see Part IIC., *infra.* But such consistency is not a virtue, where, as in this instance there intervened this Court's *National Woodwork* decision which, while expressly reserving the precise question, for the first time declared the statutory principle which must govern its resolution. In this circumstance it was incumbent on the Board to reexamine the validity of the "right of control" theory in light of this Court's teachings. The Board did not do so. Five courts of appeals, however, some of which had previously approved the theory (see Bd. Br. 16, n.9), did recognize that a new look at the issue was necessary. Each of the courts determined unanimously that the Board's theory was inconsistent with the statute as interpreted in *National Woodwork.*[6]

For example, the Eighth Circuit held:

> "A study of *National Woodwork* convinces us that the decision of the Third Circuit correctly reflects the teachings of that case and that Board precedent to the contrary can no longer be followed.
>
> "*National Woodwork* made clear that the test in each case is whether, under all the surrounding circumstances, the conduct of the Union has, as its

[6] *NLRB* v. *Local 164, IBEW,* 388 F.2d 105, 107-110 (C.A.3); *American Boiler Mfrs. Assn.* v. *NLRB,* 404 F.2d 556, 561 (C.A.8); *Beacon Castle Square Bldg.* v. *NLRB,* 406 F.2d 188, 192, n. 10 (C.A.1) (dictum); *Western Monolithics Concrete Products, Inc.* v. *NLRB,* 446 F.2d 522, 526 (C.A.9); *Local 636, Plumbers & Pipefitters* v. *NLRB,* 430 F.2d 906 (C.A.D.C.), followed in *Local 742, Carpenters* v. *NLRB,* 444 F.2d 895 (C.A.D.C.), *cert. denied,* 404 U.S. 986.

objective, the preservation of work for unit employees or whether the agreements and boycotts are tactically calculated to satisfy the union's objectives elsewhere. If the latter is the case, 'the boycotting employer would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary. * * * The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees.' *National Woodwork,* 386 U.S. at 644-645.

"It is clear in this case that the Union's conduct was addressed to the enforcement of its collective bargaining agreement and related solely to the preservation of the traditional tasks of job site plumbers. Indeed, the Board found that the Union did not have 'objectives elsewhere.' This being the case, we hold that the conduct of the Union, though coercive, was not violative of § 8 (b)(4)(B)." (*American Boiler Mfrs. Assn., supra,* 404 F.2d at 561, footnote omitted.)

So too, the District of Columbia Circuit declared that "the Board's application of the 'right to control' test completely ignores the teaching of the Supreme Court in *National Woodwork*" and identified the factors which the Board was required to consider:

> "Thus the *National Woodwork* test focuses on whether the employees have a dispute with their own employer. Is it proper to bring pressure to bear on him because it is his dispute? Or is he a 'neutral' on whom the union is bringing pressure to attain objectives elsewhere? In our view, the 'right to control' test, as formulated by the Board, is irrelevant to this determination and tends to focus attention on the wrong factors. The union's position is that it is seeking to preserve the work of Page's employees from being eliminated by

> factory prefabrication. It is this claim of primary activity which the Board must appraise."[7]

The Board ultimately responded to *National Woodwork,* and to the five adverse appellate decisions in *Local Union No. 438, etc. and George Koch Sons, Inc.,* 201 NLRB 59 (hereafter *"Koch"*). The Board adhered to the right of control test.

In the Board's view, "the whole thrust of the *National Woodwork* decision is that the pressure as directed to Frouge was primary only because (1) its object was work preservation and (2) *Frouge was in a position, as the facts themselves demonstrated, to respond itself to the union's pressure and give the union's members the work that they had traditionally performed*" (201 NLRB at 63). That description of this Court's decision (reiterated at Bd. Br. 17) is inaccurate. The second factor (underscored in our quotation) is not even mentioned as a basis for the holding, although it had been stressed in the Board's brief (Bd. Br. No. 110, Oct. Term 1967, pp. 5-6, 10). Thus, contrary to the Board, *National Woodwork* did indeed hold that the objective was primary once it was determined, "under all the surrounding circumstances, [that] the Union's objective was preservation of work for Frouge's employees," and *therefore* was not tactically calculated to satisfy union objectives elsewhere (386 U.S. at 644, footnote omitted).

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[7] *Local 636, Plumbers & Pipefitters, supra,* 430 F.2d at 909. See also *Local 164, IBEW, supra,* 388 F.2d at 107-108, 109; *Western Monolithics, supra,* 446 F.2d at 526. In *NLRB* v. *Local No. 28, Sheet Metal Workers,* 380 F.2d 827, 830 (C.A. 2), the Court also employed an analysis inconsistent with the right to control test.

In the *Koch* opinion the Board also sought to refute the objection that the right of control test was a *per se* rule:

> "In following this approach, however, our analysis has not nor will it ever be a mechanical one, and, in addition to determining, under all the surrounding circumstances, whether the union's objective is truly work preservation, we have studied and shall continue to study not only the situation the pressured employer finds himself in but also how he came to be in that situation. And if we find that the employer is not truly an 'unoffending employer,' who merits the Act's protections, we shall find no violation in a union's pressures such as occurred here, even though a purely mechanical or surface look at the case might present an appearance of a parallel situation." (201 NLRB at 64, footnote omitted).

But this was mere cosmetics. As the court below said:

> "* * * the approach of the Board as elaborated in *Koch*, and which, as we have indicated above, is a *per se* test once the *actual locus of legal control* is isolated; the Board does not consider other circumstances to determine whether the employer without control over the work itself is nevertheless not a neutral in the labor dispute." (Pet. 10a-11a, n. 9 cont., emphasis in original. See also *id.* 8a, n. 9.)

For while the Board argues "that the presumption that the union's pressure in such circumstances is secondary can be rebutted", it has found such a dispute to be primary only in the single situation in which "the struck employer itself instigated its loss of power over the work in dispute" (Bd. Br. 16).[8]

[8] The characterization of that situation as "for example" (*id.*) is therefore misleading.

And, while the Board here seizes on the fact that the union informed the general contractor Austin "that it would not let Hudik install the climate control units involved" (Pet. 141a; see Bd. Br. 21), it has also found the strike to be secondary where the union has not communicated with the general contractor, and where it points to nothing but the employer's loss of the right of control. *Koch* itself is such a case.[9]

We have examined the *bona fides* of the Board's assertion that right of control is not a *per se* test because that disclaimer was accepted by Judge MacKinnon in a dissent below causing him to approve the Board's decision in this case although he had joined in the decisions in the *Local 636* and *Local 742* cases, p. 19, n. 6, *supra*. See Pet. 100a-101a, n. 44. However, while experience has properly caused the courts to be wary of Board *per se* tests, even a genuine case-by-case approach does not merit judicial approval when it is based on a misunderstanding of the governing legal principle.

[9] The extent to which the locality is organized, a factor heavily relied upon by the dissenting opinion below (Pet. 75a-77a, 104a-109a) and discussed by the ALJ in his decision (Pet. 107a-158a) does not appear to have been relied on by the Board (see Pet. 141a-142a, and the analysis of this point at Pet. 11a-12a, n. 9 cont.). In no case has the Board discussed the extent of union strength in the community of the strike, or given any indication that it considers it to be a relevant factor. We do not mean to suggest that the Board should consider this factor, since we regard the approach of the dissenting opinion, that the potential of success is a factor weighing against the legality of a strike or other economic weapons, to be wholly antithetical to the design of the Act. See pp. 11-18 *supra*, and particularly *Machinists Union* v. *Wisconsin Rel. Comm'n.*, — U.S. —, 44 U.S.L.W. 5026, 5030, 5031; *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 317; and *Porter Co.* v. *NLRB*, 397 U.S. at 109, quoted at p. 30, *infra*.

An example close at hand, because it too involved the Board's attempted regulation of the parties' economic weapons, is *American Ship Bldg.* v. *Labor Board,* 380 U.S. 300, where this Court held that the Board had erred in outlawing bargaining lockouts although it had "exempted certain classes of lockouts from proscription" (see *id.* at 307).

The right of control theory interprets § 8(b)(4)(B) as protecting an employer against economic pressure from his employees if, according to the Board, he is helpless in the circumstances; and the single exception which the Board countenances, see p. 22, *supra,* is based on whether "*we find* that the employer is not truly an 'unoffending employer' who merits the Act's protection" (201 NLRB at 64, emphasis added). Both of these concerns are entirely misplaced. The primary-secondary dichotomy which governs § 8(b)(4)(B) depends not on the economic vulnerability or moral culpability of the employer, but on whether the dispute arises out of the employer-employee relationship. It is Congress which has established the criteria for determining whether an employer is "truly unoffending," that is whether the dispute does not involve his employees. See pp. 16-17 *supra.*

In this case, as in *American Ship,* it must be said that "the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the function of the sections relied upon" (*id.* at 318).

B. The foregoing discussion demonstrates the accuracy of the Court of Appeals' statement that "the whole affirmative case that the Board makes for the

right to control doctrine is found in a single simplistic paragraph of its *Koch* opinion," which it then quoted (Pet. 27a-28a, n. 33, quoting 201 NLRB at 62, that court's emphasis):

> By the contract under which [the subcontractor] Phillips was to perform its work at the G.E. site or not perform any work at all, *Phillips was contractually required to utilize in its work certain prefabricated pipe* which had not been worked on by the employees the [union] Respondents represented. Thus, *although the Respondent's claim of work preservation was indeed valid,* Phillips by its contract with [the general contractor] *Koch had no power to give the Respondents the work they sought,* since such work was never Phillips' to award in the first place. And as Phillips had no past, present, or future authority to award this work to the *Respondents,* their *actions here must have been undertaken in order to produce their effects elsewhere. Therefore,* since the pressure directed at Phillips was undertaken for its effect elsewhere, *such activity was secondary* even though Phillips was the immediate employer here. As the Supreme Court itself said in *National Woodwork,* "In effect Congress in enacting § 8(b)(4)(A) of the Act (hence this holds for the present Section 8(b)(4)(B)) . . . barred as a secondary boycott union activity *directed against a neutral employer,* including the immediate employer when in fact the activity directed against him was carried on for its effect elsewhere."

The heart of the theory, on which the conclusion ("therefore") that the union's activity was secondary depends, is the assertion that the union's actions "*must have been undertaken in order to produce their effects elsewhere*", that is, on the general contractor who as the result of the agreement with the striking employ-

ees' employer possesses the "right to control". This central proposition is not further justified in the *Koch* opinion, but an explanation is given at Bd. Br. 20-21:

> "Confronted by the demands of its employees, Hudik had available only two courses of action: it could have induced Austin to change its requirements and specifications for the job or, failing that, it could have terminated its contract with Austin. The second course (like a refusal to bid on the job initially) would not have preserved or produced work for Hudik's employees; indeed, it not only would have deprived the employees of the job of connecting the Slant/Fin units but also would have deprived the employees of other piping work in the Home. The first course could have produced work for Hudik's employees only if Austin could have been induced to buy units that did not have prefabricated internal piping." (Footnote omitted.)

Thus, the Board's justification for its conclusion is the assumption that the Act's secondary boycott provisions are designed to interdict employee demands concerning their own working conditions that the employer is able to meet only by effecting a change in his business relations with others. The Board's implication is that a situation such as this, where a collective agreement places the employer in the position that he can deal with a third party only on terms other than those offered, is an aberration intended to be extirpated through § 8(b)(4)(B). That assumption and that implication are incompatible with the system of collective bargaining established by the Act and the specific purpose of that provision.

1. As we have seen, the Act's permission to engage in collective bargaining and to use the primary

strike, and its prohibition of the secondary boycott, do center the resolution of labor disputes in the bargaining unit covering the employer and his employees. But the Act does not presuppose that the employer and employees confront each other within a hermetically sealed container in which all pressures must be completely spent.

A collective agreement has the inevitable consequence of restricting the employer's freedom to deal with others. The employer's promise to pay his employees a certain amount per hour means that the employer cannot for long accept contracts to do work at a price less than his labor costs, or contracts tendered by financially unstable companies that do not pay their bills promptly enough to permit him to pay his employees. The employer's promise not to expose his employees to certain hazards means that the employer cannot purchase machinery that does not contain the required safeguards—in other words, that he cannot deal with suppliers whose products are cheap but dangerous. The employer's promise that his employees will not be required to work nights or weekends means that he cannot deal with those who demand service at those times. The examples could be multiplied endlessly.[10]

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[10] Bd. Br. 23, p. 17 cites as "endors[ing] the Board's approach, although not all of its analysis" an article, Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 Harv. L. Rev. 904 (1976). That analysis is deemed to be "consistent with the findings of the Administrative Law Judge in this case". These are the findings, relied on by the dissenting opinion, but not the Board, relating to the extent of organization in New York discussed at p. 23, n. 9, *supra*.

Professor Leslie asserts that the key to an understanding of the problem presented here is "the fact that the union has an interest

Sections 7, 8(a)(5), 8(d) and 13 of the Act embody the Congressional judgment that it is not the role of government to protect employers who are unable in

in restricting competition among employers." and that in light of that interest "the most efficient way of preserving bargaining unit work is the cartelization of" employers with whom the union deals by "secur[ing] a work preservation agreement." He says further that "To succeed, the union must ensure the participation of all plumbing subcontractors in the geographic area. Were a subcontractor free to bid on contracts that did not preserve the demanded work for the bargaining unit, he would attain a competitive advantage over other plumbing subcontractors and thus would fatally strain the cartel." 89 Harv. L. Rev. at 908-909. Except for injecting the conclusory pejorative "cartel", this statement that it is imperative for a union to organize all the employers in an industry if it is to be "successful" in maintaining labor standards, does not provide a novel insight. Mr. Chief Justice Taft wrote in *American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184, 209:

> "Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of the neighborhood."

This was followed by Mr. Justice Stone in *Apex Hosiery* v. *Leader*, 310 U.S. 469, 503-504:

> "Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor

the give and take of bargaining to convince their employees that a particular demand will cost both the employer and the employees more in lost work or added

> standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

Thus, even under the antitrust laws, whose concepts the article borrows (although without citing either *American Steel Foundries* or *Apex*), it does not constitute a violation for a union to attempt to organize all the employers, and to exert economic pressure to compel them to adhere to the labor standards which the union seeks to establish despite the inevitable effect on other levels in an integrated economy.

The result under the secondary boycott law is no different. Indeed, the article proceeds from an entirely different view of § 8(b)(4)(B) and the national labor policy generally than that which Congress has established:

> "The subcontractor and the union do not have adverse interests on this issue; collective bargaining in the right to control situation does not involve the give and take between parties representing all relevant interests that national labor policy assumes. If this is true, it is difficult to see how labor policy is furthered by allowing the union to strike the subcontractor." (89 Harv. L. Rev. at 911).

In light of the difficulties of organizing and keeping organized all competing employers, and the limits of the elasticity of demand of buyers of construction (*see, e.g. New York Times*, City Edition, July 31, 1976, p. 1), it is open to grave doubt whether this accurately describes the subcontractor's interest, or whether the subcontractor necessarily shares Professor Leslie's view that he and the union are not adversaries in this context. If it were at all relevant, more would have to be shown of the real, rather than hypothesized characteristics of the construction industry.

But, of course, such a study is not relevant, because under the national labor policy established by Congress, collective bargain-

costs than it is worth, or who, in those instances in which reason (as the employer sees it) fails, are unable to prevail in a test of economic strength. And, of course, the converse is equally true. The Act does not protect employees who cannot convince their employer of the justice of their demands even though those demands are eminently reasonable, and who do not have the economic strength to achieve acceptance of those demands through a successful strike against that employer. For, as Mr. Justice Black wrote for the Court in *Porter Co.* v. *NLRB,* 397 U.S. at 109:

> " * * * the Act as presently drawn does not contemplate that unions [or employers] will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."

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ing does not involve everyone who has an economic interest in the outcome, but rather an employer and his employees, or at most a multi-employer group and their employees. The right to strike is similarly focused. The law of secondary boycotts does not prohibit a strike against the employer where success will have an adverse impact on the employer's customers, or those who have an economic relationship with the employer. Rather, § 8(b)(4)(B) protects those secondary parties only by forbidding the striking employees from exerting direct pressure against them in order to obtain leverage in their primary dispute with the employer. That provision is a rejection of the proposition that the labor law should take account of the inter-relatedness of independent parties at various levels of production, as this Court squarely held in the *Denver* case. Congress determined to follow the logic of narrowing the allowable area of economic conflict rather than the logic of the proposition that all components of the economy are interrelated, which is the premise of Professor Leslie's thesis.

See also *Machinists Union, supra,* 44 U.S.L.W. at 5030 and 5031.[11]

Thus, the fact that compliance with a collective bargaining demand concerning the employees' own wages, hours and terms and conditions of employment has the inevitable consequence that the employer cannot continue some of his business relationships with another does not transmute the primary labor dispute into a secondary boycott. For, if that consequence were sufficient to demonstrate a § 8(b)(4)(B) violation, that provision would give back to employers the protection denied in §§ 8(a)(5) and 8(d), and take away that granted employees in §§ 7 and 13.

In the instant case the employees made the judgment that their interests were best served by conditioning their agreement to install climate control units for Hudik on the requirement that they were to "cut and thread internal piping." They believed that overall they would gain more by working only if they could perform all the tasks they had traditionally performed than they would lose by foregoing the opportunity to install units containing pre-cut and threaded piping.

Whether their judgment was sound or not is of no relevance here. "The wisdom or unwisdom of the men,

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[11] The dissenting opinion below gave great weight to the proposition that: "Hudik could not decline to bid on projects with prefabrication specifications and continue to be a competitive subcontractor." (Pet. 103a). But as we have seen, the Act does not protect Hudik against this consequence of his employees' demands concerning their own working conditions and for the preservation of their own job security. Hudik also could not continue to be a competitive subcontractor if the wages he had agreed upon were higher than those paid by his competitors, but this does not deprive the employees of their right to insist on receiving the agreed-upon wage.

their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute" (*Labor Board* v. *Mackay Radio,* 304 U.S. 333, 344). See also *Labor Board* v. *Washington Aluminum Co.,* 370 U.S. 9, 16. Under the system of the free collective bargaining embodied in the Act they were entitled to mark out their own position as to the working conditions they would require as the *quid pro quo* for their labor. Hudik, in turn, was free to make his own judgment of where his best interest lay. He could have responded by proposing an alternative package of benefits. He could have bargained to deny the union any job protection or for a no-strike clause which would limit the remedies available to them in the event of future work preservation disputes, see Pet. 29a-30a, n.34. And, he could have locked out his employees to force them to concede, or if they struck for an agreement, he could have replaced them.

The situation is no different when, as here, the employees have concluded an agreement, saved themselves the right to strike in response to a breach of the work preservation provision, and determined to counter their employer's failure to abide by the contract by exercising that right to strike. The *employees,* not the Board, must decide whether, on balance, they gain or lose by acceding to their employer's conclusion that installing units containing pre-cut and threaded pipe will over the long term, produce more work, not less. And, if they decide they lose by acquiescing, then their employer must decide whether to attempt to reopen the agreement, or whether to attempt to continue to do

business with strike replacements. See particularly *Machinists Union, supra,* 44 U.S.L.W. at 5031, text and note at n. 10.

Whether the case concerns the initial work preservation demand, or the demand that a work preservation promise once made is to be respected, we submit that the one avenue of recourse closed to the employer is to refuse his employees what they seek and to utilize the Board to force those employees to work on his terms. Yet, that safe haven is precisely what the Board has granted him here.

That distortion of the Act cannot be justified on the theory that Hudik "had no power to give the [employees] the work they sought." So long as there is competition in the business market, a collective agreement is always a calculated gamble for the employer.[12] If there are employees willing to work for other employers for less the gamble may be a losing one. There is never a guarantee that the employer and his employees will prosper if the bargain is improvident. But the collective bargaining process—not § 8(b)(4)(B)—is the system of redress the Act provides.

The fact that so long as the employees stand firm their employer has open only "courses of action" (Bd. Br. 20-21) that require him to forego certain contracts

[12] It is a gamble for the employees, too. Particularly in an inflationary period they might be able to receive more for their labor if they were not bound by an agreement.

In this respect labor agreements differ not one iota from ordinary commercial transactions. The law of contracts does not permit one party to escape its obligations on the excuse that the bargain turns out to be disadvantageous. And the doctrine of impossibility provides no succor for a party who has brought upon himself mutually inconsistent obligations.

or to secure modifications of those contracts does not mean that from the employees' point of view the matter is not solely that of their own working conditions. The limits on the employer's freedom are the inevitable consequences of his employees' convictions that they wish to work for him only on certain specified terms. The employer's dilemma is not the product of pressure designed to enlist an unconcerned party in a dispute not his own, but of his inability at the bargaining table to persuade the employees to agree to work without protection which they deem necessary for their job security.

2. The Board proceeds as if it were self-evident that the strike had to be to secure some concession concerning the installation of the climate control units. But neither the record evidence nor common sense support that hypothesis.

What happened here is that the employees refused to provide their labor on terms other than those to which their employer had agreed. A more elemental exercise of the statutory right to engage in concerted activities is not readily imagined. And, it should go without saying, that activity is unmistakably primary. Too, by refusing to work under terms which are in breach of the agreement, the employees served notice on the employer that he cannot breach his collective bargaining agreement with impunity. As Professor Paul Samuelson has noted, a strike for an agreement normally takes place because "the workers believe that the employer would not have been forced [up to his last offer] except for the threat of a strike, which hangs over the negotiation like a time bomb. * * * Threats become hollow unless carried out. Both parties must show that they are prepared to in-

cur at some point the costs of a strike." [13] By the same token, a union that does not enforce its collective bargaining agreements reduces them to a shred of paper. Thus the dynamic of the collective bargaining system requires that at times a strike be called even though no immediate satisfaction is expected or desired:

> "To protect itself from imposition by its bargaining opponent, each party must impress the other with the fact that it can and will defend its interests and that unbridled aggressiveness will provoke costly stoppages. In other words, strikes serve to establish mutual respect; they also establish mutually acceptable standards of equity that can be used for settling future disputes. * * * It may be conceded that, with rare exceptions, the pecuniary stake in a *single* strike is rarely worth the economic losses incurred by either party." [14]

Thus, if one measures the cost and benefit only in terms of the final settlement as compared to the offer that was "on the table" when the strike began, the gain is often less than the loss. "In the steel strike of 1959 [for example] the company got no better terms than it could have gotten without undergoing the strike, and the same was true for the union in the General Electric strike of 1960." [15]

Accordingly, it is wholly impermissible for the Board to infer that the union must have been motivated by a desire to coerce Hudik to do *anything* in the short run,

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[13] Paul Samuelson, *Economics*, (New York: McGraw-Hill, Inc., 1976), p. 590.

[14] Melvin Reder, *Labor in a Growing Economy*, (New York: Wiley & Sons, Inc., 1957), p. 171.

[15] Alfred Kuhn, *Labor: Institutions and Economics*, (Harcourt, Brace & World, Inc., 1967), p. 138.

rather than "to establish mutual respect," *etc.* The likelihood, even the certainty, that this would result in a short-run loss of work adds nothing to the Board's argument. For, as we have demonstrated, a union which engages in a strike (like an employer who takes a strike) does so in the expectation that even if it is successful, the short-run losses will outweigh the gains; what is at stake is the union's long-run relationship with the employer. And, under the circumstances confronting the union, a strike to maintain its standards and the sanctity of its agreement was not only a rational response but one which it could hardly avoid for long.

A related deficiency in the Board's theory is that it assumes that work preservation cannot have been the union's objective except by coercing Hudik to compel Austin to change its agreements because otherwise the strike would have resulted in less rather than more work (Bd. Br. 21). This is the equivalent of saying that a union cannot be striking for a wage increase when it is clear (as it often is) that the employees cannot, even if they ultimately win the strike, recoup the earnings that they lost by striking instead of working. Both arguments assume that a decision to strike is not made unless there is a certainty, or at least a reasonable likelihood, that the improvement in the collective agreement would equate the losses by the strike. Again industrial experience is to the contrary. "The very essence of a strike is that its outcome is uncertain, or else it would never have been undertaken. If union and management could predict the result it would of course pay them to settle on those terms and avoid all the costs attending a strike. But a strike is a gamble which may or may not pay off, and union members and

managements are necessarily gamblers when they decide to call or take a strike."[16] Thus, the claim that the strike constituted a "demand that the work be taken from Slant/Fin employees and reassigned to the Union" (Bd. Br. 21, quoting Pet. 83a, dissenting opinion) is wholly unjustified, and the assertion that the "Union *necessarily* intended to use Hudik as its cat's paw in order to place pressure upon those who had control over the work sought" (Bd. Br. 22, emphasis added), while rhetorically effective, is simply untrue.

3. As a variation on the theme that the union was not seeking to preserve traditional work, it is contended at Bd. Br. 23-24 that "[t]he union in this case has brought pressure upon Hudik to cause it to 'reach out' to acquire new work for its employees." This argument has not been part of the rationale of the right of control doctrine in any of the Board's decisions, and for good reason—it wholly distorts the "preserve-acquire" distinction which this Court accepted arguendo in *National Woodwork*. As the majority said in response to the same point below:

> " * * * by the very nature of subcontract bidding, a subcontractor will always be acquiring work when he bids on a project; the characterization of union activity as having a work preservation objective must therefore depend on whether it is the *type* of unit work which the employees have traditionally performed, not whether they actually performed the particular work in question. And * * * enforcement of a work preservation clause is designed to protect such traditional work whether the subcontract specifications themselves required that the traditional work be replaced by

[16] Neil W. Chamberlain and Donald E. Cullen, *The Labor Sector* (New York: McGraw-Hill, Inc., 1971), p. 579.

> prefabrication or whether the specifications granted to the subcontractor discretion to displace the employees' traditional work. In both situations the union seeks to prevent elimination of employees' work through factory prefabrication or, at a minimum, to prevent their employer from lending active support to eliminate of that work." (Pet. 24a, n. 25 cont.)

We add two comments. First, the foregoing description of the realities of subcontract bidding accords with Congress' perception. In the Senate Report which described a provision by which what is now § 8(f) came into the Act, it was said:

> "In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated." (S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., p. 28; see also *id.* at 27.)

Second, the Board's argument is of course wholly divorced from the theory underlying the "preserve-acquired" distinction as explicated in *National Woodwork:*

> "It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. But the boycott in the present cases was not used as a sword; it was a shield carried solely to preserve the members' jobs. We therefore have no occasion today to decide the questions which might arise where the workers

> carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product." (386 U.S. at 630-631.)

The reality to workers of the threat of a boycotted product to their livelihood does not turn upon whether their employer makes the decision to use the product which takes over functions they have performed of his own volition or because of outside pressure; nor can the right of the employees to use economic action to defend themselves against that threat turn on that difference. To hold otherwise would strip them of their *National Woodwork* shield, due to circumstances truly beyond their "control".[17]

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[17] Here, as in *National Woodwork,* several of the *amici* argue that the right of control test should be approved because it would promote industrial efficiency. And here the same answer is called for: "Those arguments are addressed to the wrong branch of government" (386 U.S. at 644). It should not be necessary to say any more on this subject, but it does not seem inappropriate to add that this argument is not only irrelevant but unsubstantiated. In the *Local 636* case, the Court of Appeals said: "There is no indication in this case that work done at the job site varied to any material extent, in either cost or quality, from that produced as prefabricated material at a factory." (430 F.2d at 909, n. 2.) In this case, neither the general counsel nor the charging party adduced any evidence on this point. The record does show that Hudik itself has installed similar air conditioning units (by other manufacturers including American Standard & Radiator Co.) for which the piping was "prefabricated on the job" by this union (A. 46-47). Thus, while we may grant that in some circumstances work preservation agreements prevent the use of economically more efficient methods (at least if one discounts such hidden social costs as loss of craft skills and increased centralization of production facilities), there is no warrant for the *amici's* implicit assumption that a gain in efficiency if work preservation agreements are breached is a universal verity subject to judicial notice.

4. As the Court of Appeals stressed, the Board's statement of the choices open to the subcontractor is incomplete "even if one focuses narrowly on the point in time when [the subcontractor] had already executed its second contract," for he could negotiate an alternative such as an agreement by the union to install the units in exchange for extra pay, perhaps in the amount that the employees would have earned if they had performed the work (Pet. 29a-31a).[18] The Board argues that because the union here did not suggest this alternative the "problem is not presented by this case" (Bd. Br. 21, n. 14, cont.). But this evasion will not serve, because the "problem" is inherent in the Board's theory, the essential premise of which is that "[c]onfronted by the demands of his employees" the sub-

[18] The Court of Appeals also properly criticizes the Board for "ignor[ing] the realities of this labor conflict and the process by which Hudik-Ross was confronted with conflicting contractual commitments." For, the "Hudik-Ross management did not innocently awake one day to find itself in the midst of this dispute. The management had negotiated, presumably in good faith, a collective bargaining agreement which obligated Hudik-Ross to preserve for its employees the work of cutting and threading internal piping on the climate control units which these employees were to install. When the management subsequently executed a contract with Austin which it was fully aware would require its employees to install units on which these employees had not done the internal piping, it could hardly have expected the employees to acquiesce in the blatant violation of their contractual rights. As we emphasized in *Local 742, supra*, 'The legal effect of the Board's test is to allow an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously wash his hands of it.' Hudik-Ross could have totally avoided the labor dispute merely by honoring its bargaining agreement and not bidding on a contract which required it to breach the valid work preservation provision it had negotiated with the union." (Pet. 19a-20a, footnotes omitted.)

contractor "ha[s] available only two courses of action" (Bd. Br. 20). The very existence of a third alternative destroys that premise, and therefore the conclusion, as the court below appreciated (Pet. 6a, 22a, n. 25, 28a, n. 33 cont., 29a-31a, 38a, 42a-43a). It is of no analytic significance whether the subcontractor's alternative is to offer the union a compromise,[19] or to accede to an offer by the union.

Nor does it save the logic of the Board's position that because "any payment of extra compensation would have been satisfied out of its pocket[,] Hudik would not likely have viewed such a demand as affording a practical alternative to the two courses suggested [at Bd. Br. 20-21]" (Bd. Br. 21, n. 14 cont.). We can well imagine that Hudik (or any other subcontractor in his position) would regard it to be far more "practical", in the sense of "desirable", to require his employees to work under conditions less favorable than provided by the collective agreement and without any compensation for the breach. But this is far from saying that the subcontractor is "powerless" (Bd. Br. 15, 27) to do anything but terminate the subcontract or press the general to change its terms. And, it wholly escapes us how an employer can be deemed a "neutral" in a dispute which he is able to resolve by giving compensation to his employees, or how it can fairly be said that pressure which can achieve such payment by the employer "*must have*

[19] The Court of Appeals was surely right when it said that Hudik, "the culpable party in generating the controversy, had an obligation to reconcile its actions with its contractual commitments" (Pet. 29a, n. 34). It does not bespeak an objective beyond the employer that the union faced with one breach of the agreement declines to take the initiative in remaking the terms on which that breach will be excused.

been directed" at other parties, as the Board argues (Bd. Br. 21, quoting the dissent below, and *id.* 15, 27). Plainly, the union's efforts can "succeed" without changing any decision of the general contractor contrary to Bd. Br. 23, attempting to distinguish *National Woodwork*.

Thus, the Board's impracticality argument does not meet the objection that the right of control theory posits a dilemma which does not exist. Rather, the argument is self-defeating because it demonstrates that the dispute between the union and Hudik reduces to the basic economic struggle "between employer and employees as to the share or division between them of the joint product of labor and capital" (*American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209). That is what the primary strike is all about.

And so, the Board is driven to the position that a demand for extra compensation to perform the work would also be illegal. (Bd. Br. 21, n. 14) That indeed, is the result which it reached, although without articulating its reasoning, or attempting to reconcile that conclusion with the right of control analysis, in *Local 742, Carpenters (J.L. Simmons Co.)*, 201 NLRB 70, *enforcement denied sub nom. Local 742, Carpenters* v. *NLRB*, 533 F.2d 683 (C.A.D.C.), petition for certiorari pending, No. 75-1706.[20]

This position is utterly unfaithful to the basic analysis on which the right of control theory depends, *viz.*,

[20] In that petition the Board (p. 7, n. 5) says: "It should make no difference that the Union offered Simmons an alternative that had not been offered to Hudik in *Enterprise—i.e.*, negotiating the payment of a wage premium to compensate its employees for the loss of the finishing work", and reiterates the sentence at Bd. Br. 21, n. 14, which we quote in the next paragraph of the text.

that the object of the union's pressure must be secondary because it cannot succeed without a change of decision by a party other than the struck subcontractor (here Hudik) (Bd. Br. 15-21, 23, 27). For, of course, paying extra compensation to his employees is something which the subcontractor can do by himself.

The inadequacies and internal contradictions of the right of control theory are further exposed by examination of the details of the Board's defense of this position, which consists of a single sentence:

> "Too, any demand for extra compensation for work that Hudik never possessed and did not have a right to obtain, no less than a demand for such work itself, would demonstrate a union 'object' beyond Hudik and reflect, at least in part, dissatisfaction with the decision of the 'owner, the designer, the general contractor' (Pet. App. 115a) to use prefabricated goods." (Bd. Br. 21, n. 14)

Let us count the ways in which this is wrong:

(i) At the outset, the argument misstates the nature of a demand for extra compensation in this situation. The compensation is not "for work that Hudik never possessed and did not have the right to obtain" (*id.*), but rather it is compensation for work that Hudik *does* possess—installing the climate control units. See *e.g.*, Pet. 29a.[21]

(ii) In the context of this case the argument is obviously circular. It takes as given the proposition that "a demand for such work * * * would demonstrate

[21] This, of course, disposes of the suggestion that § 8(b)(6) is somehow involved. (Chamber of Commerce Br. 13, n. 9). *American Newspaper Publishers Assn.* v. *Labor Board*, 345 U.S. 100, 111; *Labor Board* v. *Gamble Enterprises*, 345 U.S. 117, 123.

a union 'object' beyond Hudik", although that is the ultimate proposition which is sought to be established by the Board's entire brief.

(iii) The assertion that a demand for extra compensation would "reflect, at least in part, dissatisfaction with the decision of [a third party]" is legally irrelevant. For, while we unhesitatingly agree that effectuation of the Congressional intent does not permit the phrase "cease doing business" to be read narrowly and literally (see *Operating Engineers,* 400 U.S. at 304-305), we think that the phrase means, at a minimum, that some kind of actual impact upon the third party is contemplated by the striking union. A strike which reflects "dissatisfaction with the decision of" third parties not by putting pressure on those parties, but by insisting on compensation from the employee's employer, may under no stretch be regarded as a secondary *boycott;* Congress did not protect neutrals against a union's state of mind.

(iv) The proposition that the demand for extra compensation would "reflect, at least in part dissatisfaction of [the third parties decision] to use prefabricated goods" is also unsubstantiated and implausible. The assertion betrays one the major infirmities of the Board' method—readiness to attribute a secondary objective to employee pressure on their employer which supports an elementary demand relating to the employees' own working conditions.[22]

[22] By its silence the Board escaped the onerous task of explaining its adherence to the critical assumption that the subcontractor who has given up "control" has only *two choices* in the teeth of record evidence that he had at least *three.* The agency's unwillingness to deal with facts with which it was confronted (*Local 742* was argued orally and decided together with *Koch, supra,*

C. We are now in a position to assess the effects of the Board's right of control doctrine, as exemplified by its decision in this case. First and foremost, that doctrine, contrary to the basic premise of both § 8(b)(4)(B)'s prohibition and §§ 7, 8(a)(5), 8(d), and 13's protections, interdicts the use of economic pressure by employees against their own employer in a dispute concerning their own working conditions. Second, in the

see *id.*, 201 NLRB at 39), reinforces the impression that that opinion is a mere "rationalization" (Pet. 5a) of an institutional dogma, and wholly undermines the generous assessment of the dissent below that the Board acted in light of "expert knowledge of the competing forces within the construction industry" (Pet. 111a-112a)—a factor not mentioned in any Board opinion on this subject.

In two other cases, the union instead of striking imposed on the subcontractor who had breached the work preservation agreement, a penalty as prescribed in the agreement itself. In both cases the Board did not consider whether the contractor's ability to install the units subject to such a penalty was an alternative choice, showing that the union's objective was *not* to effect a business relationship, between the subcontractor and general contractor; rather it determined that the imposition of a penalty was not "restraint or coercion" within the meaning of Section 8(b)(4)(ii), and was lawful for that reason. *United Association, etc.,* 167 NLRB 602, 604; *Southern California Pipe Trades,* 207 NLRB 698, 700.

In the first case, the Eighth Circuit affirmed the Board on the ground that the right of control theory was devoid of merit. *American Boiler Manufacturers Association* v. *N.L.R.B.,* 404 F.2d 547, 555, a companion to the *American Boiler* case quoted at pp. 19-20, *supra.*

In the second case, the Ninth Circuit reversed the Board's interpretation of Section 8(b)(4)(ii). *Associated General Contractors of California, Inc.* v. *N.L.R.B.,* 514 F.2d 433, 438-439. The merits of the right of control doctrine, and specifically the proposition discussed in the text, were not litigated, because both the petitioner employer association and the respondent Board accepted that doctrine. The intervenor union did not litigate this issue either, instead arguing for a remand if the Section 8(b)(4)(ii) issue was decided adversely to it and the Board.

circumstances of this case, the Board's doctrine deprives the employees of their right to strike to enforce the employer's promise,[23] and, as the Court of Appeals put it, "render[s] nugatory the commitment which Hudik-Ross made and demean[s] the collective bargaining process which is the cornerstone of labor relations in the United States." (Pet. 24a-25a, footnote omitted). See also *id.* at 34a-35a.

Third, the theory of the right of control test—that the striking employees' employer is not a primary if he does not have the right to grant the employees' demands—leads inexorably to the question: If the employer has entered into an agreement with a third party, whereby the employer abandons control (and thus, under the Board's theory immunizes himself from pressure by the union to enforce its work preservation interests), may the union put direct economic pressure on the party that does have control, or is it forbidden from putting economic pressure on anyone?

In deciding this case, the Board expressly refused to choose which of these alternatives flows from its right of control theory (Pet. 142a, n.1), and its counsel say on brief that "this Court need not consider that problem" (Bd. Br. 25, n.18). While it is ordinarily the better course of adjudication not to decide questions of law until they are presented by the facts of a particular case (even though it may ultimately be decided that the first case *compelled* a particular resolution of the reserved issue), it not infrequently occurs that an understanding of its practical and doctrinal consequences on other classes of cases which will in-

[23] Indeed, as the court below points out, it deprives them of the protection of the agreement entirely, Pet. 35a-36a, n. 38. See p. 63, *infra*.

evitably arise is conducive to an informed decision of the first case.

This is the situation here. For, as we shall demonstrate, neither of the answers to the question—whether employees who are forbidden to strike their own employer on the ground that he does not have control may put direct economic pressure on the party which *does* have control—can be reconciled with Congressional judgments embodied in the Act, and set out in Part I of our brief. Thus, the question should be confronted not in order to answer it, but to gain the insight that either answer undermines the Congressional intent and that the theory which compels a choice between such legally unacceptable alternatives must itself be fatally defective.

For over ten years after *De Angulo, supra,* 121 NLRB 676 (1958), the case in which the Board first held that his employees cannot put pressure on an employer who has surrendered his right of control, the Board did not decide whether the employees may put pressure on the party that does have control.[24] The Board's first resolution of this issue was *Bricklayers Union, Local No. 8,* 180 NLRB 43, 45-47 (1969), *reversed sub nom. Western Monolithics Concrete Products, Inc.* v. *National Labor Relations Board,* 446 F.2d 522 (C.A. 9) (hereinafter *Western Monolithics*).

In that case the collective bargaining agreements between the union and West Valley and Nesbit masonry subcontractors "contained a work preservation agreement which stated that construction of fireplaces was

[24] The issue was expressly reserved in *Local 1066, Longshoremen (Wiggin Terminals, Inc.),* 137 NLRB 45 (1962).

unit work, traditionally performed at the job site" and permitted the union to refuse to install prefabricated fireplaces, unless constructed by bargaining unit employees (*id.* at 523-524). Besco, a general contractor, subcontracted the installation of fireplaces to West Valley and Nesbit, and specified that the subcontractors were to install fireplaces prefabricated by non-bargaining unit employees. The union engaged in economic pressure not only against the subcontractors West Valley and Nesbit (the counterparts of Hudik in this case) but also, by picketing the project site, against the general contractor Besco (the counterpart of Austin here). The Board, applying its right of control test, found a § 8(b)(4)(B) violation in the pressure against the subcontractor, but because the general had the right of control, determined that pressure against it was lawful. See *id.* at 525. Judge Eugene A. Wright, writing for the Ninth Circuit, disagreed:

> "The anomalous result of applying the Board's test to this case is that the union cannot picket West Valley or Nesbit under which case the common situs picketing would be governed by the standards of Moore Dry Dock Co., 92 N.L.R.B. 547. Instead, the Board ruled that the union may picket the general contractor Besco and shut down the entire project to enforce its demand regarding a limited aspect of the job.
>
> We are thus compelled to conclude, as have the commentators and at least four of our sister circuits, that the Board's singular reliance upon right to control is improper and should be abandoned." (*Id.* at 525-526, footnotes omitted.)

Then, after explaining that the right of control test is irreconcilable with *National Woodwork,* he quoted

with approval Judge Skelly Wright's analysis in *Local Union No. 636* v. *NLRB,* 430 F.2d 906:

> " 'No claim has ever been made that Local 636 has any interest at all in the labor relations of Holy Cross Hospital, the usual type of 'secondary' object. If the union had any objective with regard to the hospital, it was to convince the hospital not to use pre-piped units. But focusing on this aspect of the case makes for faulty analysis: the whole point of the work-preservation agreement in this case, as in *National Woodwork*, was to convince builders generally not to use prefabricated materials. Work preservation clauses, of necessity, will have effect by a domino-like process: the union negotiates the restriction with its employer—the contractor. The contractor, bound by his collective bargaining agreement, will not contract with a builder who seeks to use prefabricated materials. The builder may then accede to the demand that the work be done at the job site, or he may seek another contractor not bound by such a restrictive union contract.' " (430 F.2d at 909-910, quoted in 446 F.2d at 526-527.)

This reasoning was then placed into the context of the *Western Monolithics* case:

> "The finding of the Board here that Besco was susceptible to coercive action by the union because of its right to control removed the important alternative set forth above. So long as the union is free to view Besco as the target of its activity, Besco cannot 'seek another contractor not bound by such a restrictive union contract.' *The union's complaint here was clearly with West Valley and Nesbit who agreed to the work preservation clause. Its attempts to force them to stop doing business with Besco were lawful primary activity aimed at work preservation.* However, when it expanded

its attack to a threat to Besco it extended the controversy to a protected neutral who had the right to determine its relationship with West Valley and Nesbit and seek other subcontractors who were not bound by the restrictive work preservation clause." (*Id.* at 527, emphasis added.)

In short, the *Western Monolithics* Court determined that the right of control test distorts the primary-secondary dichotomy which Congress established, subjects to economic pressure the party which Congress intended to protect, and immunizes the true primary against whom such pressure is lawful.[25]

This was the posture when the instant case was before the Court of Appeals, prompting that Court to express concern at the possibility that:

> "the Board is prepared to accept the position advanced by *amicus curiae* Chamber of Commerce of the United States that, unless the target of the strike has *both* the power to control the work assigned and a bargaining relationship with the union, the union's economic pressures are illegal secondary activity." (Pet. 26a, n. 29.)

This prospect was viewed with disfavor:

> "There would thus be no primary employer; indeed, in most subcontracting situations the sub-

[25] Bd. Br. 23, n. 17, cites the Ninth Circuit decision in *Associated General Contractors of California, Inc.* v. *National Labor Relations Board*, 514 F.2d 433, 437-438 (C.A. 9) *(AGC)* as approving the right of control doctrine. There is indeed such discussion in the opinion. However, as noted at p. 45, n. 22, *supra*, the validity of the doctrine was not argued by the parties. This explains, perhaps, the panel's reversal, *sub silentio*, of a prior decision within the circuit. Plainly, the *AGC* opinion "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University* v. *Simon*, 416 U.S. 725, 740).

> contractor's employees would be deprived of all economic weapons and all legal mechanisms for preserving their traditional work against onrushing technological changes. * * * so that, in a situation where a union is motivated by a single lawful goal, it is nevertheless adjudged guilty of secondary activity without there being some employer against whom it could have exerted pressure gives the section a harshness which has not heretofore been suggested by its most aggressive proponents." (*Id.*)

The Court of Appeals added, in terms reminiscent of the reasoning of the *Western Monolithics* court:

> "*On the other hand,* when a union's sole objective is work preservation, it would be anomalous to allow it to press its demands on a general contractor with whom it has no ongoing relationship. Rather than limit the scope of labor disputes consonant with the congressional intent expressed in § 8(b)(4), such a result is likely to expand them since it would probably affect all subcontractors on a jobsite." (Pet. 26a-27a, n. 29, emphasis added.) [26]

[26] The first sentence of the foregoing passage, minus the phrase we have italicized, is quoted at p. 23 of the brief *amicus curiae* of the Chamber of Commerce in support of the proposition that where the immediate employer has given up the right of control the union should be allowed to put pressure on no one—not the general contractor, not the supplier of the material, not, in a word, whoever possesses the talismanic "control." The omission is significant because it tends to conceal the context of the quoted passage, which was, as we have shown, a rejection of the Chamber's thesis.

The Chamber's limited quotation also obscures the fact that the *reason* that it is anomalous to allow pressure to be placed on the party with whom there is no employer-employee relationship is, as the court below said in the sentence immediately following that quoted by the Chamber, that Congress' policy in § 8(b)(4)

What the court below feared may already have come to pass. In *Carpenters Local 112 (Summit Valley Industries)*, 217 NLRB No. 129, 89 LRRM 1799, the Board affirmed, without comment, the decision of an administrative law judge who concluded (at pp. 28-29 of his decision) that it was unlawful for the union to put pressure on parties with whom the union was not in contractual "privity". Neither the ALJ nor the Board attempted to reconcile this conclusion with the assumptions of the right of control test, or to justify a result whose consequence was to deny the workers any right to use their economic strength to protect their jobs. See pp. 50-51, *supra*. Nor did the Board explain why it was deciding in the way it was, an issue

was to limit the dispute to the immediate disputants. But, as the court below and the *Western Monolithics* court recognized, the right of control doctrine is antithetical to that policy.

If it be assumed, as does the right of control theory, that the basic dispute is between the employees and the party that does have control, the conclusion that economic pressure may be placed on that party is not anomalous, but entirely logical; indeed, it is compelled by the Act's policy to permit the employees to engage in concerted activities to protect their working conditions. See Part I of this brief.

To be sure § 8(b)(4) does not establish a general policy that concerted activities may be undertaken only in the context of an employer-employee relationship, for it did not repeal the definition of "labor dispute" in § 2(9) which was taken *in haec verba* from the Norris-LaGuardia Act. What § 8(b)(4) does, as we stressed, is to confine the use of direct pressure to the immediate parties to the dispute, who normally, and in this case certainly, are the employer and his employees. Thus, we do not contend that the union may put pressure on both the subcontractor and the general contractor. We do submit, however, that for these reasons, as well as those stated by the Court of Appeals, the Chamber's contention that the affected employees are forbidden from putting pressure on *anyone* to protect their job security, and to protest a breach of the applicable collective agreement, is completely without merit.

it had previously decided the other way.[27] It thus remains true that although the Board has consistently adhered for 17 years to the doctrine that employees may not strike their own employer if he has surrendered the right of control over the content of the work, it has yet to give a principled response to the inescapably connected problem whether pressures may be exerted against the party that does have control. The Board's performance emulates the attitude of the 18th Century legal mind as described by Professor Thomas Reed Powell:

> "If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind."[28]

The legal theory which this kind of administrative decision-making produces should, we submit, be viewed with healthy skepticism by a reviewing court.

In any event, as we have shown in this section of our argument, the right of control theory leads inevitably to one or the other of two choices both of which undermine "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." (*Denver Building*, 341 U.S. at 692, quoted at Bd. Br. 13.) Accordingly, it may not survive.

[27] Quite properly, therefore, the Board's brief does not treat *Carpenters Local 112* as a definitive Board resolution of the question, extending instead a neutral invitation to "[c]ompare" that decision with that of the Board in *Western Monolithics* (Bd. Br. 25, n. 18).

[28] From an unpublished manuscript quoted in Arnold, *Criminal Attempts—The Rise & Fall of an Abstraction*, 40 Yale L.J. 53, 58 (1930).

III. THE LEGISLATIVE HISTORY AND THE PRECEDENTS RELIED ON BY THE BOARD MILITATE AGAINST THE RIGHT OF CONTROL THEORY.

A. *The Legislative History.* The only support for the right of control test which the Board claims to find in the legislative history of the 1947 Amendments is a fraction of a sentence in the House Report on the Hartley bill, which was not enacted. That report is not authoritative, see *e.g., Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 288-289; but even if it were, it could not aid the Board's position. For, when the entire sentence which the Board's brief fragments is read, and particularly when it is read in the context of the entire paragraph, it appears both that the House Report did not "forecast" (Bd. Br. 16) the right of control test, and that the House bill, like the bill that was enacted, regarded an employer-employee dispute over the employee's own working conditions as the hallmark of protected primary activity.

It is said at Bd. Br. 16-17:

> "The test was forecast in the House Report on the 1947 amendments to the Act; the report indicates that it was the intention of Congress to proscribe boycotts where "the employers are powerless to comply with demands giving rise to the [boycotting] activities * * *." H. R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), 1 Legislative History of the Labor Management Relations Act, 1947, p. 314 (1958)."

We now set forth the entire paragraph from which the Board has wrested a small portion:

> "(13) 'Sympathy strike.' (14) 'Illegal boycott,' and (15) 'Jurisdictional strike.' The acti-

D. Despite the brevity of the Board's explanation of why it imputes an illegal object to the union where the employer has given up control, our examination of the details of the Board's theory has been lengthy. For the premises articulated by the Board are erroneous in several respect, and even more significantly, its unspoken, and apparently unconsidered assumptions concerning the use of economic weapons are refuted by industrial experience. Yet we do not thereby intend to divert attention from the central propositions of our affirmative case that because Congress decreed the exercise of economic weapons by employees against their employer to protect their working conditions to be the essence of primary activity, which the Act contemplates; that the factors which the Board considers are not those which this Court in *National Woodwork* directed it to consider; and that the result reached by the Board cannot be squared with either of "the dual congressional objectives" delineated in the *Denver* case, 341 U.S. 675, 692 and reaffirmed in *National Woodwork,* 386 U.S. at 626-627. In short, the conclusion of this Court's opinion in *Labor Board* v. *Brown,* 380 U.S. 278, is directly in point here:

> "Courts must, of course, set aside Board decisions which rest on an erroneous legal foundation. *Labor Board* v. *Babcock & Wilcox Co.,* [351 U.S. 105,] 112-113. Congress has not given the Board untrammelled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. *Labor Board* v. *Insurance Agents, supra,* at 498. In determining here that the respondents' conduct carried its own badge of improper motive, the Board's decision, for the reasons stated, misapplied the criteria governing the application of §§ 8(a)(1) and (3). Since the order therefore rested on an erroneous legal foundation, the Court of Appeals properly refused to enforce it."

vities that these three terms describe have in common the characteristic that they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. *More often than not* the employers are powerless to comply with demands giving rise to the activities, *and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all.* These activities the bill makes unlawful concerted activities under section 12 of the act, and it removes the immunities that the present laws confer upon persons who engage in them." (*Id.*, emphasis added to show the beginning and end of the sentence from which the Board quotes.)

It is thus clear that the absence of the employee-employer nexus of the dispute was the critical characteristic of "illegal boycotts" and the other activities described in this paragraph of the report. It is precisely because the dispute did not involve the employees of the struck employer that he was deemed "[m]ore often than not" powerless to comply with the union's demands, for example, that the employees of the employer with whom the Union had its real dispute should be organized or be paid the union wage.[29]

It can certainly not be said in this case that Hudik and his employees "are the helpless victims of quar-

[29] There is not the slightest indication here or anywhere else in the legislative history (and of course the Board cites nothing) to indicate that the employer was intended to be protected where he was "powerless" because of the greater economic strength of the party with which he is doing business. Indeed, as we develop in our discussion of the *Denver Building* case, pp. 57-60 *infra*, if absence of power over that business relationship were the requisite of "neutrality", much conduct which is now forbidden as a secondary boycott would be lawful.

rels that do not concern them at all". On the contrary, it is Hudik's employees alone who are the victims of Hudik's direction to them to install the units in violation of their agreement which concerns them very much indeed.

B. *Denver Building and Operating Engineers.* It is asserted at Bd. Br. 25 that "the decision of the Board here is consistent with" *Labor Board* v. *Denver Bldg. Council,* 341 U.S. 675, and *NLRB* v. *Operating Engineers,* 400 U.S. 297. The Board is mistaken. Its position depends on a mischaracterization of the ground for this Court's holding that the unions' activity in those cases was illegal. In "both cases the union pressure was secondary" *not* "because it was exerted against a firm that lacked power to grant the union's ultimate demand" as stated at Bd. Br. 27, but because it was exerted against a firm other than the one whose labor relations were the focus of the dispute.

The *Denver* case is particularly instructive. At the outset of the paragraph from which Bd. Br. 26 quotes selectively[30] are two sentences that place this Court's analysis in context:

> "In the background of the instant case there was a longstanding labor dispute between the Council and Gould & Preisner due to the latter's practice of employing nonunion workmen on construction jobs in Denver. The respondent labor organizations contend that they engaged in a primary dispute with Doose & Lintner alone, and that they sought simply to force Doose & Linter to make the project an all-union job." (341 U.S. at 688.)

[30] The court below described the Board's quotation from the same paragraph on brief below (reprinted at Pet. 37a) as "less than candid" (Pet. 39a).

Thus, the Court's discussion was a response to the unions' claim that their primary dispute was with the general contractor. This position was rejected because the Court determined "under all the surrounding circumstances" (*cf. National Woodwork,* 386 U.S. at 644) that the underlying labor dispute was with the subcontractor over *its* labor conditions—that is, its "practice of employing nonunion workmen on construction jobs in Denver" (*id.*). In the present case, of course, we contend, just as the Board did in *Denver* and as this Court determined, that the primary employer is the subcontractor because the dispute is between that employer and his employees over those employees' working conditions.

Contrary to the Board's contention, in *Denver* this Court did not reach that conclusion on the ground that the subcontractor "alone had power to employ union workers and thus to resolve the dispute" (Bd. Br. 25). That proposition is nowhere mentioned in this Court's opinion, and for that reason alone cannot explain this Court's decision.[31] Moreover, the Board's statement is inaccurate. As the Court of Appeals observed "* * * the general contractor in *Denver* had full legal power to assign the work which the union did not want nonunion employees to perform * * *" (Pet. 38a). Indeed, he had the precise

[31] The Board's brief thus employs the same argumentative technique that infected the Board's discussion of *National Woodwork* in *Koch*, 201 NLRB at 63, see p. 21 *supra*. In both instances, the Board supplies to this Court's opinions the statement that the subcontractor (in *Denver*, Gould & Preisner; in *National Woodwork*, Frouge) possessed the right of control, although this Court said nothing of the kind in either case. Then, like the magician it pulls out of both decisions the proposition that the decision turned on the subcontractor's right of control.

right of control held by Austin, the general contractor in this case: *He could terminate the subcontract.* That, as the *Denver* Court recognized, was precisely what the unions' strike against the general contractor was intended to accomplish. This objective was illegal because, the Court having determined the labor relations policy of the subcontractor to have been the focus of the controversy, "the strike against the general contractor was 'tactically calculated to satisfy union objectives elsewhere'." (Pet. 40a, quoting *National Woodwork*). This was, as the Court of Appeals said, a "classic secondary boycott" (Pet. 37a).

It was, of course, unquestioned that the unions in *Denver* could lawfully have picketed the subcontractor provided that they did so in a manner which did not implicate the employees of other contractors and the general contractor on the construction situs, see *Moore Dry Dock Co.,* 92 NLRB 547 and the discussion in *Western Monolithics,* quoted at p. 48 *supra.* That such picketing, if successful, would have made it impossible for the subcontractor to perform the subcontract would not have made the picketing illegal. As the Court of Appeals said:

> "Given *National Woodwork* and the 1959 proviso added to § 8(b)(4)(B), the mere fact that the primary employer, in order to settle the dispute between himself and his employees concerning his 'labor relations * * * *vis-á-vis* his own employees,' might be forced to terminate his contract with such a third party cannot alter this conclusion." (Pet. 40a.)

This was clearly correct under *National Woodwork,* 386 U.S. at 627 and the other precedents in Part I of

this brief, culminating in *Operating Engineers,* 400 U.S. at 304.

If the union in the present case had, in its dispute with Hudik, picketed Austin, the general contractor, *then* there would have been a violation of the Act under *Denver.*[32]

C. *Sand Door.* The Board's last point is that "the Union's contract with Hudik does not give it license to engage in unlawful secondary pressures" (Bd. Br. 27, heading). That proposition is incontrovertible. For, as stated at Bd. Br. 29, citing *Carpenters' Union* v. *Labor Board,* 357 U.S. 93, 105 (*Sand Door*), whether the union's pressure on Hudik is primary or secondary depends on the criteria for differentiating the two types of activity, "criteria that Congress has incorporated in the Act;" the parties cannot by contract con-

[32] Some of the *amici curiae* speak grandly of the "right" of the general contractor, architect, engineer, etc. to make specifications. We assume, arguendo, that the union is not privileged to interfere with that "right" by engaging in direct economic pressure against these entities. But they, in turn, have no right to co-opt the labor of a group of employees to install the products which are manufactured according to their specifications any more than they have a right to require the employer of those workers to enter into a contract to use those specifications. Their economic power may be sufficient to make it highly desirable for that employer to do so, but the Act does not protect him against the economic pressure of his employees to choose *not* to do it, nor does it protect the specifiers from the consequence of that refusal. That consequence is the same as in any successful strike. Again, the *Denver* case provides an instructive analogy. If the union in that case had been able to shut down the subcontractor successfully, the general contractor would have been unable to finish the project, unless he retained another subcontractor; so here, Austin would not succeed in having its climate control units installed unless it obtained another subcontractor whose employees were willing to perform the work.

vert into primary activity that which the statute makes secondary (Bd. Br. 29). Thus, the basic issue in this case is whether under the "criteria that Congress has incorporated in the Act" the union's activity is primary or secondary; it is for that reason that our argument began by identifying these criteria, and why the right of control test, which is a Board construct without Congressional provenance, cannot govern the rights of the parties. More narrowly, it is for that reason that the Board's determination that the union had a "valid work preservation clause in the agreement with Hudik" (Pet. 141a), is dispositive. The brief's discussion of *Sand Door*, and indeed its entire argument, fails to confront the necessary legal consequences from that determination, for given § 8(e) of the Act, a strike to implement a lawful agreement is also primary under the "criteria that Congress has incorporated in the Act" (Bd. Br. 29).

Section 8(e) reversed *Sand Door* insofar as it held that a secondary agreement could "have legal radiations affecting the relations between the parties" (357 U.S. at 108) even though enforcement by the means described in § 8(b)(4) would be a violation of the Act. (This is fully developed in *National Woodwork,* 386 U.S. at 634). The *National Woodwork* Court held also that § 8(e), like the other "loophole-closing" measures enacted in 1959, did not alter the primary-secondary dichotomy, *id.* at 635-642. Thus, since the agreement that the employees would not be required to install climate control units unless they would also perform the work of cutting and threading piping was lawful under § 8(e), their refusal to perform that work, which they were directed to do in violation of that agreement, was not forbidden by § 8(b)(4)(B). *Id.* at 645-646.

In short, only primary agreements are lawful under § 8(e); § 8(b)(4)(B) and § 8(e) embody the same criteria; *therefore,* maintenance of an admittedly lawful agreement by refusing to perform work which does not comply therewith is likewise unmistakably primary.

The Court of Appeals did not, as Bd. Br. 27-29 insinuates, treat the agreement herein as validating a strike which would have been secondary but for the agreement. The significance which that court attributed to the agreement, and properly so, was two-fold: (1) it was one of the "surrounding circumstances" which showed that the union's refusal to install the climate control units was primary activity directed at the union's relationship with Hudik rather than "tactically calculated to satisfy union objectives elsewhere" (386 U.S. at 644), (see p. 4, *supra*); and (2) it further demonstrates the incongruity—indeed, the fundamental inconsistency with the Act's basic structure and purposes—of the Board's treating Hudik as a neutral. As the Court of Appeals said:

> "Thus, to accept the Board's characterization of Hudik-Ross as a neutral bystander under these circumstances would allow the 'Cinderella-like transformation of an obviously involved party,' and would both render nugatory the commitment which Hudik-Ross made and demean the collective bargaining process which is the cornerstone of labor relations in the United States." (Pet. 20a-25a).

The foregoing objection was met by the Board in *Koch* with the suggestion that the union's "remedy may well lie in a civil suit for breach of contract,"

201 NLRB at 63 (citing *Sand Door!*). The dissenting opinion in the court below also embraced the suggestion, see Pet. 110a-116a, 120a-132a. The majority below correctly rejected this palliative:

> "It is sufficient to observe that the suggestion—that an agreement to preserve work from *nonjobsite* prefabrication is legal and enforceable in court even though it obligates the employer to do that which the union could not exert economic pressure to force the employer to do—is completely untenable in light of the congressional overruling of *Sand Door* by the passage of § 8(e) and the *National Woodwork* Court's formulation of the *in pari materia* relationship of §§ 8(e) and 8(b)(4)(B). *See* 386 U.S. at 644-45 (majority opinion); *id.* at 649 (memorandum of Mr. Justice Harlan) ('§ 8(e), it is agreed, is to be taken *pari passu'* with § 8(b)(4)(B)); *id.* at 660, *quoting Ohio Valley Carpenters,* 136 NLRB 977, 987 (1964) (Stewart, J., dissenting) ('there is little point and no logic in declaring an agreement lawful under 8(e), but in finding its enforcement condemned under 8(b)(4)(B)')." (Pet. 35a-36a, n. 39, emphasis in original.)

In sum, we agree with Bd. Br. 29: "But whether the Union's pressure on Hudik is primary or secondary depends on the criteria for differentiating the two types of activity, criteria that Congress has incorporated in the Act." It follows, we submit, that Hudik cannot by contract convert into *secondary* activity that which the statute makes *primary.* The precedent which addresses this problem is not *Sand Door,* but *Carrier* (*Steelworkers* v. *Labor Board,* 376 U.S. 492). There, it was argued that picketing which would otherwise be primary was unlawful because it was not at the factory gate owned by the struck employer, but

at an entrance to the struck facility owned by the neutral railroad. The argument was rejected: "[Carrier] would distinguish between picketing an entrance to a struck plant which is owned by the primary employer and picketing a gate *which by design or otherwise had been conveyed to a neutral* furnishing delivery service, an anomaly which we do not believe Congress intended" (376 U.S. at 501, emphasis added). Although the facts are different here, it would be no less anomalous to allow an agreement between the employer and another party to deprive the employees of the right to engage in primary activity—here a strike to protect their job security. For, while the *Carrier* opinion did not articulate the principle underlying this part of the decision—doubtless because it was deemed self-evident—it must be that when Congress guaranteed the right to strike so that employees might have equal bargaining strength with their employers, it did not license those employers, acting in their own self-interest, to convert that right into a wrong.

CONCLUSION

As the Court of Appeals said, the Board's right of control test "is a continuing inducement for employers to violate their bargaining agreements", and "demean[s] the National Labor Relations Act by encouraging deliberate, if not always planned, violations of bargaining agreements" (Pet. 34a-35a). Moreover, it nullifies the right vouchsafed by the Act, as construed in *National Woodwork,* to enter into and enforce work preservation agreements, and "strike[s] from workers' hands the economic weapons traditionally used against their employers' efforts to abolish their jobs" (386

U.S. at 640). The doctrine should be disapproved, and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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